

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

76-7471
over

United States Court of Appeals
FOR THE SECOND CIRCUIT

THE PENINSULAR & ORIENTAL STEAM NAVIGATION COMPANY,

Plaintiff-Appellant,

—against—

OVERSEAS OIL CARRIERS, INC.,

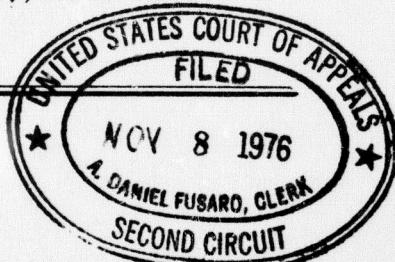
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

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Relevant Docket Entries

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
74 Civil 1854

THE PENINSULAR & ORIENTAL STEAM NAVIGATION COMPANY,
Plaintiff,
—against—

OVERSEAS OIL CARRIERS, INC.,
Defendant.

- 4/26/74 Filed complaint & issued summons
- 5/14/74 Filed defendant's answer
- 4/ 8/75 Filed agreed fact statement
- 6/ 7/76 Filed stipulation and additional agreed fact statement
- 8/23/76 Filed Opinion No. 45,000
- 9/ 2/76 Filed Judgment No. 76,809
- 9/20/76 Filed plaintiff's notice of appeal

Agreed Fact Statement

1. When this suit was commenced and at all material times, plaintiff was and is an English limited liability company with its principal place of business in London and with no New York office.
2. When this suit was commenced and at all material times, defendant was and is a New York corporation with its principal place of business in New York.
3. At all material times plaintiff owned and operated S.S. CANBERRA and employed her crew.
4. At all material times defendant owned S.T. OVERSEAS PROGRESS and employed her crew, and Maritime Overseas Corporation managed S.T. OVERSEAS PROGRESS as defendant's agent.
5. At all material times OVERSEAS PROGRESS was an American flag tanker of approximately 13,030 gross tons with maximum speed of approximately 13.8 knots.
6. At no material time did OVERSEAS PROGRESS have any ship's doctor or nurse or any operating room.
7. At all material times CANBERRA was a British flag passenger vessel of approximately 43,975 gross tons with approximately 820 crewmembers, a passenger capacity of approximately 2,238, and a maximum speed of approximately 25 knots.

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8. At all material times CANBERRA had a hospital, an operating room, a ship's surgeon, an assistant surgeon, two nurses, and a hospital assistant.
9. On July 4, 5, and 6, 1973, William Turpin was a crew-member of OVERSEAS PROGRESS and was employed by defendant.
10. On July 4, 5, 6, 7, and 8, 1973, CANBERRA was en route from Dakar to New York with passengers, having departed Dakar on July 1, 1973, and OVERSEAS PROGRESS was en route from Haifa to Baltimore, having cleared Gibraltar on June 29, 1973.
11. On July 4, 1973 William Turpin reported that he was experiencing severe chest pain. On July 4 and 5, 1973, the Officers of OVERSEAS PROGRESS gave or caused to be given to William Turpin several morphine injections and glycerin nitrate tablets for suspected heart attack, guided by ship's medical books and radio advices from the Public Health Service.
12. During the evening of July 5, 1973, William Turpin suffered a further attack accompanied by severe chest pain, and the Master of OVERSEAS PROGRESS caused a radio request to be sent asking all ships in the vicinity which had a doctor to answer. Three ships answered that request: CANBERRA, S.S. MICHELANGELO, and a Russian vessel name unknown. The closest to OVERSEAS PROGRESS of those three ships was CANBERRA.

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13. At 2114 Greenwich Mean Time (GMT) on July 5, 1973, CANBERRA received a second message from OVERSEAS PROGRESS that the latter had a crewmember [William Turpin] who was in critical condition with apparent heart attack, and requesting CANBERRA to meet OVERSEAS PROGRESS to give treatment. At that time, OVERSEAS PROGRESS reported that she was on course 270 degrees true, maintaining speed of 13.8 knots, and was at position 35 degrees 58 minutes north, 45 degrees 10 minutes west. At that time, CANBERRA was at 32 degrees 30 minutes north, 48 degrees west, on course 283 degrees true, making an average speed of 23 knots at 118½ revolutions per minute (RPM).

14. In response to that second message, CANBERRA agreed to meet OVERSEAS PROGRESS at 35 degrees 13 minutes north, 46 degrees 22 minutes west. To effect that meeting both ships altered course at approximately 2130 GMT. OVERSEAS PROGRESS maintained her maximum speed of 13.8 knots and changed course from 270 degrees true to 229 degrees true. CANBERRA increased her speed from 23 knots to 25 knots by adding 9½ RPM, and changed course from 283 degrees true to 50 degrees true.

15. The Master of OVERSEAS PROGRESS was authorized by defendant to send or cause to be sent the aforementioned radio requests.

16. Solely because of the aforementioned radio requests, CANBERRA rendezvoused with OVERSEAS PROGRESS, and CANBERRA's ship's surgeon treated William Turpin.

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17. At 2130 GMT on July 5, 1973, the nearest shore hospital to OVERSEAS PROGRESS was in St. John's, Newfoundland, 740 miles away which, at a speed of 13 knots, would have taken OVERSEAS PROGRESS 57 hours to reach and would have necessitated a course change from 270 degrees true to 335 degrees true.

18. Approximately 6 $\frac{1}{4}$ hours after CANBERRA and OVERSEAS PROGRESS altered course, they rendezvoused at 35 degrees 13 minutes north, 46 degrees 22 minutes west, CANBERRA having travelled 140 miles at maximum speed of approximately 25 knots and OVERSEAS PROGRESS having travelled 78 miles at maximum speed of approximately 13.8 knots.

19. After rendezvousing with OVERSEAS PROGRESS, CANBERRA lowered one of her boats and transferred William Turpin aboard for hospital treatment. After taking William Turpin aboard, CANBERRA continued the increased 9 $\frac{1}{2}$ revolutions per minute speed of approximately 25 knots to New York, where she arrived on July 8, 1973 about 2 $\frac{1}{2}$ hours after her scheduled arrival time.

20. While William Turpin, who was then about 63 years old, was aboard CANBERRA, the ship's surgeon diagnosed that he had suffered a recent myocardial infarction and was also diabetic.

21. In August 1973, defendant received from Cunard Line, plaintiff's landing agent at New York, a \$248 bill for services rendered to William Turpin by CANBERRA's surgeon, and defendant promptly paid that bill.

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22. When the boat from CANBERRA came alongside OVERSEAS PROGRESS on July 6, 1973, the person in charge brought a typed message from the Master of CANBERRA to the Master of OVERSEAS PROGRESS, requesting that the latter countersign the message to confirm an earlier radio-telephone conversation between the two Masters. The Master of OVERSEAS PROGRESS complied with this request and countersigned the message. A copy of the countersigned message is annexed hereto, marked Exhibit "A", and made a part hereof. The countersigning by the Master of OVERSEAS PROGRESS was done with the authority of defendant.

23. The distance from CANBERRA's position at 2130 GMT on July 5, 1973 to the entrance to New York harbor is 1,166 miles. The distance from the place where CANBERRA and OVERSEAS PROGRESS rendezvoused to the entrance to New York harbor is 1,258 miles. That additional distance of 92 miles plus the 140 miles which CANBERRA steamed in order to meet OVERSEAS PROGRESS makes a total of 232 extra miles which CANBERRA necessarily travelled solely because of the request for assistance by OVERSEAS PROGRESS.

24. Although defendant is not prepared at this time to agree as to the amounts of extra fuel necessarily consumed by CANBERRA or the monetary value of any such fuel, defendant concedes that CANBERRA steamed the aforementioned 232 extra miles solely because of the aforementioned request for assistance by OVERSEAS PROGRESS. Defendant also concedes that the extra fuel consumed by CANBERRA in increasing speed from approximately 23 knots to approximately 25 knots for the 140 miles from the place of

Agreed Fact Statement

diversion to the place of rendezvous was directly attributable to the aforementioned request for assistance by OVERSEAS PROGRESS. Defendant is not now prepared to concede any causal relationship of any additional fuel consumed by CANBERRA because of her increased speed following the rendezvous and until CANBERRA arrived at New York on July 8, 1973.

25. Solely as the result of the aforementioned radio requests by OVERSEAS PROGRESS, William Turpin was taken aboard CANBERRA on July 6, 1973 and while aboard was hospitalized, examined, tested, and treated by the ship's surgeon and assistant surgeon and was cared for by the ship's nurses and was given medication and nourishment. Without conceding any liability therefor or the fair market value of such services, defendant concedes that those services did have a value.

26. Following arrival of CANBERRA at New York on July 8, 1973, William Turpin was taken by ambulance to the United States Public Health Service Hospital, Staten Island, for further treatment, and was eventually discharged from that Hospital.

27. By debit note dated September 26, 1973 plaintiff billed defendant's agent Maritime Overseas Corporation for CANBERRA's diversion costs, medical, out-of-pocket expenses in the amount of £ 4693.39 equivalent to \$12,108.95, none of which defendant has paid although several times requested by plaintiff.

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*28. To assist the Court to follow the movements of CANBERRA and OVERSEAS PROGRESS, there is annexed hereto, marked Exhibit "B", and made a part hereof, a portion of a chart for the mid-Atlantic which shows the movements of CANBERRA in heavy dotted lines from 12 Noon (ship's time) on July 5, 1973 until she changed course at approximately 1930 hours that date and met OVERSEAS PROGRESS at the small dot with a circle around it just north of latitude 35. The course of CANBERRA after that meeting is indicated by a solid heavy black line running to the west. The movements of OVERSEAS PROGRESS on a course due west (270 degrees true) from Gibraltar is shown by a thin line at approximately latitude 36 degrees, which line continued until 1830 hours (ship's time), when OVERSEAS PROGRESS changed course to 229 degrees true in order to meet CANBERRA at the aforementioned circled dot, just north of latitude 35. The scale of nautical miles is found on the right-hand margin of the chart (top margin of the Exhibit), with each degree of latitude being equal to 60 nautical miles.

Dated: April 7, 1975

* Exhibit "B" is not included in the Joint Appendix because not believed necessary to determination of the appeal.

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Agreed Fact Statement

EXHIBIT "A"

on board: ss CANBERRA

AT SEA
5th July 1973

Captain
Overseas Progress

Dear Sir

I trust you understood my remarks on the R.T. when I came to your assistance. I have to inform you that you should inform your owners my company, P & O Steam Navigation Company, may look to them for reimbursement of diversion costs, medical and out-of-pocket expenses.

Would you please sign a copy of this letter to indicate your understanding and receipt of this information.

Yours faithfully

/s/ W. J. LIDWIN
CAPTAIN
OVERSEAS PROGRESS

/s/ E. SNOWDEN
CAPTAIN

Stipulation and Additional Agreed Fact Statement

The parties, by their respective undersigned attorneys, stipulate that the liability issue herein (i.e., the question of whether defendant is or is not liable to reimburse plaintiff's diversion costs and medical and out-of-pocket expenses) be and hereby is submitted for trial and decision by the Court based on the agreed fact statement dated April 7, 1975 filed herein on April 8, 1975, and the following additional agreed facts:

29. The countersigned message, copy of which is annexed as Exhibit "A" to the parties' agreed fact statement dated April 7, 1975, accurately confirms the radio-telephone ("R.T.") remarks therein summarized; to wit, that plaintiff's Master told defendant's Master that plaintiff "may look" to defendant for reimbursement, and defendant's Master acknowledged that plaintiff's Master had so stated. During these "R.T." remarks, plaintiff's Master did not demand reimbursement on behalf of plaintiff nor did defendant's Master agree to make reimbursement on behalf of defendant. Both Masters simply left open for subsequent determination by their respective employers, plaintiff and defendant, whether plaintiff would demand reimbursement and, if so, whether defendant would make reimbursement.

30. On July 13, 1973, plaintiff sent the letter of which copy is annexed hereto as Exhibit "C" and made a part hereof.

Stipulation and Additional Agreed Fact Statement

31. On July 23, 1973, defendant's duly authorized agent sent the letter of which copy is annexed hereto as Exhibit "D" and made a part hereof.

32. On September 26, 1973, plaintiff sent the letter and debit note of which copies are annexed hereto as Exhibit "E 1" and Exhibit "E 2" and made a part hereof.

33. On October 3, 1973, defendant's duly authorized agent sent the letter of which copy is annexed hereto as Exhibit "F" and made a part hereof.

34. In amplification of what is set forth in paragraph 21 of the agreed fact statement of April 7, 1975, annexed hereto as Exhibits "G 1" and "G 2" and made a part hereof are copies of plaintiff's landing agent's letter of August 23, 1973, and Canberra's surgeon's letter of August 20, 1973.

Dated: June 7, 1976

Stipulation and Additional Agreed Fact Statement

EXHIBIT "C"

The Maritime Overseas Co Ltd
126 Queen Victoria Street
LONDON EC4

13 July 1973

Dear Sirs

MEDICAL ASSISTANCE TO OVERSEAS PROGRESS BY CANBERRA

You will no doubt have received a report from the Commanding Officer of your vessel OVERSEAS PROGRESS that our vessel CANBERRA rendered medical assistance to a fireman of OVERSEAS PROGRESS on 6 July.

While CANBERRA was on voyage from Dakar to New York a message was received from OVERSEAS PROGRESS, that a fireman was suffering heart attacks. As CANBERRA was in the nearest position to your vessel and as she had a Doctor on board, she diverted and intercepted OVERSEAS PROGRESS. The patient was transferred to CANBERRA for treatment and disembarked at New York.

We must now look to you for reimbursement of our out of pocket expenses involved in CANBERRA's deviation etc. We will let you know shortly what these expenses amount to but in the meantime it would be appreciated if you would confirm that you are willing to settle.

Yours faithfully

/s/ N H J Burnett
for The Head of Insurance & Claims

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Stipulation and Additional Agreed Fact Statement

EXHIBIT "D"

(Letterhead of Maritime Overseas Corporation, 511 Fifth Avenue, New York, N. Y. 10017)

July 23, 1973

The Peninsular & Oriental Steam Navigation Company
Beaufort House
St. Botolph Street
London EC3A 7DX, ENGLAND

Attention: Mr. N. H. J. Burnett

RE: Medical Assistance to
SS "OVERSEAS PROGRESS"

Gentlemen:

Your letter of the 13th instant addressed to Maritime Overseas Company, Limited has been forwarded to this office inasmuch as the owners of the SS "Overseas Progress" are an American Corporation.

We await an accounting of expenses, as mentioned in your letter, so we may forward same to our P & I Club for their comments.

Very truly yours,

MARITIME OVERSEAS CORPORATION

/s/ W. L. REINHART
P & I Department

cc: Assuranceforeningen GARD

cc: Maritime Overseas Company, Limited—LONDON

Attention: Mr. F. Newland Smith

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Stipulation and Additional Agreed Fact Statement

EXHIBIT "E1"

**Maritime Overseas Corporation
511 Fifth Avenue
NEW YORK
NY 10017
USA**

26 September 1973

Dear Sirs

MEDICAL ASSISTANCE TO OVERSEAS PROGRESS BY CANBERRA

Further to our letter of 13 July 1973 we now enclose our debit note in respect of our out of pocket expenses, amounting to £4,693.39.

It would be appreciated if you would let us have your remittance for this amount in due course.

Yours faithfully

**/s/ N H J BURNETT
for The Head of Insurance & Claims**

Stipulation and Additional Agreed Fact Statement

EXHIBIT "E2"

Maritime Overseas Corporation
511 Fifth Avenue
NEW YORK
NY 10017
USA

26 September 1973

Statement of Expenses incurred by ss 'CANBERRA' in affording emergency Medical Assistance to your vessel 'OVERSEAS PROGRESS' in which fireman Mr William Turpin was transferred by 'CANBERRA's' sea boat from 'OVERSEAS PROGRESS' to 'CANBERRA' and taken to New York for Hospitalization.

| | |
|---|-----------|
| Accommodation and Nursing \$500 | £ 193.80 |
| Additional oil consumed by increasing to maximum speed in order to maintain programme 401 tons @ \$28.95 per ton | £4,499.59 |
| | £4,693.39 |

VAT not applicable
Exchange rate \$2.58 to £.

Stipulation and Additional Agreed Fact Statement

EXHIBIT "F"

(Letterhead of Maritime Overseas Corporation, 511 Fifth Avenue, New York, N. Y. 10017)

October 3, 1973

Our Ref: 6892-P2

P & O Passenger Division
Beaufort House
St. Botolph Street
London EC3A 7DX
England

Attention: Mr. Nicholas H. J. Burnett

Re: S/S "CANBERRA"
Assistance to Mr. William Turpin at sea
ex S/S "OVERSEAS PROGRESS"
July 6, 1973

Gentlemen:

We have for acknowledgment your letter of September 26, 1973 enclosing statement of expenses in connection with the above incident.

Although we are extremely grateful for the kind assistance you have rendered Mr. Turpin, we must point out that your claim does not appear to be in keeping with the norms and practices of the traditional concept of rescue at sea.

Stipulation and Additional Agreed Fact Statement

Indeed, we have on many occasions rendered similar aid at great risk to our crews and vessels but have never entertained the thought of recovering our expenses.

We hope that our position will meet with your understanding and trust that you will accept the assurance of our willingness to reciprocate in the unhappy event that the roles should one day be reversed.

Very truly yours,

MARITIME OVERSEAS CORPORATION

/s/ RAIMONDO G. NAGGIAR

cc: Assuranceforeningen GARD

Your P & I No. 864/73/LH

cc: Mr. J. D. Hutchison, Vice President

cc: Mr. E. T. Hill

Stipulation and Additional Agreed Fact Statement

EXHIBIT "G-1"

(Letterhead of Cunard Line Limited, 555 Fifth Avenue,
New York, N. Y. 10017)

Overseas Shipholding Group Inc.
511 Fifth Avenue
New York, N.Y. 10017

Attention: Mr. Reinhardt

August 23, 1973

Dear Sirs:

You will recall our SS Canberra picked up one of your seamen from the SS Overseas Progress on July 7th and was provided medical treatment by the ship's surgeon.

In this respect, the surgeon, Dr. Kneath, has submitted the attached bill for services and supplies used and as suggested in his letter please forward the check for same to the undersigned at the above address.

Yours sincerely,

/s/ THOMAS F. LUBY
Landing Agent

Stipulation and Additional Agreed Fact Statement

EXHIBIT "G-2"

on board: CANBERRA

20th August 1973
New York

Dear Sir

Ref: Mr W Turpin Aged 63 years Machinist/Fireman
s.s. Overseas Progress

Please find enclosed the Medical Account for treatment of
the above named crew member, in s.s. Canberra.

Could you please send the total amount *direct to me* c/o
our agents Cunard Steamship Co Ltd, 555 Fifth Avenue,
New York 10017, and please would you make the cheque
out payable to P & O Lines N/America Inc. & forward to
T. Luby, Landing Agent, Cunard Line Ltd 555 Fifth Ave
New York, N.Y. 10017.

Thank You

Yours faithfully

/s/ A C KNEATH
SURGEON

Opinion No. 45,000¹**GOETTEL, D. J.**

The sea is a hard master and those who sail her are united in a common struggle. It is their tradition to answer calls of distress regardless of cost or peril. So firmly accepted is this tradition that our laws make it a criminal offense to ignore those "at sea in danger of being lost."² This case raises the interesting (and somewhat novel) question of whether those who go to the aid of seamen in distress are entitled to have their expenses reimbursed.

On July 4, 1973, William Turpin, a 63 year old fireman aboard the S.T. OVERSEAS PROGRESS, a tanker owned by the defendant (a New York corporation), began experiencing severe chest pains suggestive of a heart attack. The ship had no doctor, nurse or operating room. Turpin was treated by the ship's officers, who were guided by medical books and radio advice from the U.S. Public Health Service.

On July 5, Turpin suffered a further attack. His condition was considered grave. The maximum speed of the

¹ The parties previously cross-moved for summary judgment on an agreed statement of facts. The Court (U.S.D.J. Pierce) denied the motions finding that there were material issues of fact in dispute. Thereafter (following reassignment of the case) the parties submitted an additional agreed fact statement and stipulated that the case was submitted for trial and decision on the agreed facts.

² Title 46 U.S.C. §728 provides:

"The master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, crew, or passengers, render assistance to every person who is found at sea in danger of being lost; and if he fails to do so, he shall, upon conviction, be liable to a penalty of not exceeding \$1,000 or imprisonment for a term not exceeding two years, or both."

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OVERSEAS PROGRESS was 13.8 knots; it would have taken the OVERSEAS PROGRESS 57 hours to reach the nearest shore hospital, approximately 740 miles away. The master of the OVERSEAS PROGRESS sent a radio request to all ships in the vicinity with a doctor. The S.S. CANBERRA, a passenger vessel owned by plaintiff (a British company), was the closest vessel with medical facilities at that time. The two ships agreed to meet. Both altered course, the OVERSEAS PROGRESS maintaining its maximum speed, the CANBERRA increasing its speed from 23 to 25 knots. The ships rendezvoused approximately six and one-quarter hours later.

The CANBERRA took Turpin aboard and had him hospitalized, examined, tested and treated by the ship's surgeon and assistant surgeon. He was cared for by the ship's nurses and was given medication and nourishment. After taking Turpin aboard, the CANBERRA continued at its increased speed to New York, arriving on July 8, 1973, about two and one-half hours after her scheduled arrival time, having travelled 232 extra miles because of the request for assistance by the OVERSEAS PROGRESS. Turpin was transferred to a Public Health Service hospital for further treatment; he survived the attack.

In August, 1973, defendant received a bill from plaintiff's New Yer^l landing agent for \$248 for services rendered by the CANBERRA's surgeon; the defendant paid that bill. On September 26, 1973, plaintiff billed the defendant's agent for CANBERRA's diversion costs, other medical and out-of-pocket expenses totalling \$12,108.95. Defendant declined to pay. This action was then commenced.

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Once it became apparent that Turpin's illness was serious the defendant became obligated to make reasonable efforts to provide him with medical care. *See The Iroquois*, 194 U.S. 240, 243 (1904); G. Gilmore & C. Black, *The Law of Admiralty*, 2d ed., §6-13 at 310. The question is whether the defendant, by entrusting Turpin to plaintiff's care, became liable for the CANBERRA's diversion costs and out-of-pocket expenses.

The arguments of the parties raise two issues: 1) whether the action is, in essence, an attempt at remuneration for "pure life salvage" and 2) whether there can be a recovery based on contract (quantum meruit or unjust enrichment).

Defendant contends that plaintiff is actually seeking an award for life salvage and that it is hornbook law that pure life salvage, *per se*, is insufficient to allow a recovery. As *The Law of Admiralty, supra*, states, §8-1 at 532:

"Historically, the saving of life was regarded as fulfilling a moral duty but not as entitling the salvor to a reward. Thus there was a natural temptation to save property first and look around for survivors later. Life salvors now have by statute a right to a 'fair share' of the award made to salvors who have saved property on the same occasions.³ Life salvage, unaccompanied by property salvage, still goes unrewarded."

³ Title 46 U.S.C. §729 provides:

"Salvors of human life, who have taken part in the services rendered on the occasion of the accident giving rise to salvage, are entitled to a fair share of the remuneration awarded to the salvors of the vessel, her cargo and accessories."

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Plaintiff counters that this is not pure life salvage since it saved the defendant considerable expense. This saving of expense, in and of itself, is sufficient to constitute a form of "salvage," argues plaintiff. See Brown, *Compensation for Life Salvage at Sea*, 2 Hastings L.J. 53, 55 (1951). In addition, plaintiff contends that life salvage principles are inapplicable here as it is seeking only reimbursement for expenses and not a salvage award.

The law of the sea has clearly not allowed an award solely for life salvage. In order to recover for life salvage, there must be property salvaged, *St. Paul Marine Transp. v. Cerro Sales Corp.*, 313 F. Supp. 377 (D. Hawaii 1970), and it must occur "substantially at the time and while both lives and property were in distress . . ." *The Eastland*, 262 F. 535, 541 (N.D. Ill. 1919). American cases do not support the proposition that one who saves life at sea, disassociated from any salvage of property, is entitled to an award.

Here plaintiff maintains that it is asking only for reimbursement of expenses, not an award. This distinction has not been recognized by the courts. In fact, Professor Brown, in his article, *supra*, admits that such an extension of the principle of salvage, while desirable, was not then (1951) embodied in our law. See, 2 Hastings L.J. at 54. This situation, while not the classic rescue at sea, does resemble life salvage, as it is possible that Turpin would not have survived a 57-hour trip to the nearest shore hospital.

The courts have been reluctant to assess maritime liens against vessels because of services to its passengers and crew. The explanation for this is that there is a moral

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duty to aid those in danger at sea and that it would be an undue burden on the ship owner whose property and personal interests had not been served. Brown, *Compensation for Life Salvage at Sea, supra* at 55.

The contract claim constitutes the crux of plaintiff's case. The complaint sounds in unjust enrichment and, in its memorandum, plaintiff cites a line of cases where a defendant was held liable for a plaintiff's services under a quantum meruit theory. See, e.g., *Rathbun v. Halvorson*, 181 F.2d 57 (5th Cir. 1950); *Kane v. M/V Leda*, 355 F. Supp. 796 (E.D. La. 1972), *aff'd*, 491 F.2d 899 (5th Cir. 1974); *Murry v. The Meteor*, 93 F.Supp. 274 (E.D.N.Y. 1950). On the other hand, defendant argues that the essential elements of an intention to pay and an implied promise to pay are lacking here; consequently plaintiff cannot prevail on this theory.

Admiralty has no power to enforce an independent equitable claim. *The Eclipse*, 135 U.S. 599, 608 (1890). However, admiralty does have jurisdiction over causes of action based on the concept of unjust enrichment as long as the claim arises out of a maritime contract. *Archawski v. Hanioti*, 350 U.S. 532, 535 (1956). Here there was no written contract between the parties. Consequently, plaintiff must establish its claim either via quasi-contract (a contract implied in law) or quantum meruit (a contract implied in fact). *Miller v. Schloss*, 218 N.Y. 400, 406-07 (1916) distinguishes the two types of implied contracts:

"A contract cannot be implied *in fact* where the facts are inconsistent with its existence; or against the declaration of the party to be charged; . . . The assent

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of the person to be charged is necessary and unless he has conducted himself in such a manner that his assent may fairly be inferred he has not contracted.

* * * * *

A quasi or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another It is an obligation which the law creates. . . ."

At the time the arrangements were made for the rendezvous, the masters of the vessels had a radio-telephone conversation in which the Master of the S.S. CANBERRA advised the Master of the OVERSEAS PROGRESS that plaintiff might look to defendant for reimbursement. This was confirmed by a letter dated July 5, 1973 from the Master of the CANBERRA to the Captain of the OVERSEAS PROGRESS which stated:

"I trust you understood my remarks on the R.T. when I came to your assistance. I have to inform you that you should inform your owners that my company, P & O Steam Navigation Company, may look to them for reimbursement of diversion costs, medical and out-of-pocket expenses. Would you please sign a copy of this letter to indicate your understanding and receipt of this information."

The parties have agreed in their additional agreed fact statement (#29) that the radio conversation and the letter did not constitute a demand for reimbursement, nor an agreement to make one; rather:

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" . . . Both masters simply left open for subsequent determination by their respective employers, plaintiff and defendant, whether plaintiff would demand reimbursement and, if so, whether defendant would make reimbursement."

In subsequent correspondence the owners of the CANNERRA made a claim for reimbursement of expenses and the defendants refused to pay. With respect to the claim for quantum meruit, no case has been found by the Court, or cited by the parties, which applies quantum meruit to the saving of life at sea. All of the cases cited by plaintiff deal with property salvage. Where property is involved, a court will imply a contract in fact if the property has been improved; *see Kane v. M/V Leda, supra*, 355 F.Supp. at 801.

Plaintiff's final argument looks to the theory of quasi-contract, or unjust enrichment. "The law creates . . . [a quasi-contract] regardless of the intention of the parties, to assure a just and equitable result." *Bradkin v. Leverton*, 26 N.Y.2d 192, 196 (1970). There are certain elements which are part of an action in quasi-contract. One of these elements is misconduct or fault, such as breach of fiduciary duty, on the part of the party sought to be charged. *Shooters Island Shipyard Corp. v. Standard Shipbuilding Corp.*, 293 F. 706 (3d Cir. 1923); *F. E. Grauwiler Transp. Co. v. King*, 131 F.Supp. 630, 634 (E.D. N.Y. 1955), *aff'd* 229 F.2d 153 (2d Cir. 1956). In this case, defendant's conduct clearly involved no misconduct, fault or undue advantage. As the above elements are lacking, the plaintiff cannot recover its diversion costs in quasi-

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contract, notwithstanding the principle that equity is no stranger to admiralty. *See Demsey & Associates, Inc. v. S.S. Sea Star*, 500 F.2d 409, 411 (2d Cir. 1974).

There is, however, one aspect of unjust enrichment present here. Plaintiff claims a total of \$12,108.95 in diversion costs. Virtually all of this is for the additional oil used. But a small amount, \$500, is for "Accommodation and Nursing", the equivalent of hospitalization costs. Had the defendant's ship been in port it would have been required to pay such expenses for its crew member, unless public facilities were available.* Moreover, these costs accrued after the transfer ("rescue") was effected and were part of custodial treatment and care. Payment of this expense is not a part of "life salvage."

Considering the absence of controlling authority it appears appropriate to consider the public policy aspects. As a foreign flag vessel operating in international waters, the S.S. CANBERRA was not subject to the criminal sanctions of 46 U.S.C. §728. It has long been accepted that awards are made after salvage to encourage voluntary assistance since "the whole theory of salvage is predicated upon the proposition that by the general admiralty law there is no legal duty to aid a thing or person who is in distress". S. H. Robinson, *Handbook of Admiralty Law* (1939) at 722. From this standpoint the allowance of an award might be said to encourage assistance. On the other hand, a ship with a stricken crewman might be reluctant to seek aid if large, unforeseen expenses could be assessed against it. The answer would seem to be inappropriately drafted leg-

* Public facilities for seamen are provided in the United States by the Public Health Service, 42 U.S.C. §249.

Opinion No. 45,000

islation or international compacts imposing sensible limitations. *See Aviation and Salvage: The Application of Salvage Principles to Aircraft*, 36 Colum. L. Rev. 224 (1936) dealing with air crash salvage.

For the present it would appear to be beyond the province of this district court to inaugurate a new policy deviating from the centuries old common law doctrine. *The Life Salver Problem in Admiralty*, 63 Yale L.J. 779, 784 (1954). Except for an award of the \$500 nursing and accommodation expense,⁵ which defendant would have been obligated to pay to a private hospital, and which was part of custodial care and not rescue, the plaintiff may not recover. Plaintiff is left, however, with the recognition that its efforts were in keeping with the finest traditions of the sea.

Judgment should be entered accordingly, within ten days.

So ORDERED:

Dated: New York, N.Y.,
August 20, 1976.

/s/ GERARD L. GOETTEL
U.S.D.J.

⁵ Defendant concedes that the hospitalization had a value but is not prepared to concede that its fair market value was \$500. It has not, however, submitted any evidence disputing plaintiff's claim. For two days of intensive care service (plaintiff's ship had an operating room, a surgeon, an assistant surgeon, two nurses and a hospital assistant), the charge does not seem unreasonable.

Judgment No. 76,809

The parties having stipulated that the liability issue herein be tried and decided by the Court on agreed fact statements filed herein dated April 7, 1975 and June 7, 1976, and the Court (Goettel, J.), pursuant to that stipulation and after due consideration and deliberation, having filed its opinion with findings of fact and conclusions of law dated August 20, 1976, ordering that judgment be entered in accordance therewith, it is

ORDERED AND ADJUDGED that plaintiff The Peninsular & Oriental Steam Navigation Company recover of defendant Overseas Oil Carriers, Inc., the sum of \$500. and plaintiff's costs of action to be taxed.

New York, N. Y.
September 1, 1976

GERARD L. GOETTEL
U.S.D.J.

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